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July 21, 1999

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

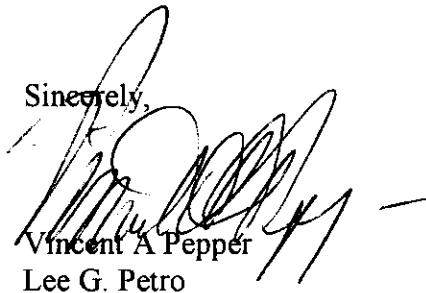
Magalie Roman Salas, Secretary  
Federal Communications Commission  
The Portals  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

RE: In the Matter of Amendment of Section 73.202(b), Table of  
Allotments, FM Broadcast Stations (Pleasant Dale, Nebraska)  
MM Docket No. 99-156/RM-9613  
Reply Comments of Mitchell Broadcasting Co. of Iowa

Dear Ms. Salas:

Transmitted herewith, on behalf of Mitchell Broadcasting Co. of Iowa, is an original and nine (9) copies of its Reply Comments in the above-referenced proceeding. Should there be any questions, please contact undersigned counsel.

Sincerely,

  
Vincent A Pepper  
Lee G. Petro

Enclosures

No. of Copies rec'd 079  
List A B C D E

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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**JUL 21 1999**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of:	}	
	}	
Amendment of Section 73.202(b),	}	MM Docket No. 99-156
Table of Allotments,	}	RM-9613
FM Broadcast Stations	}	
	}	
<u>(Pleasant Dale, Nebraska)</u>	}	

**TO: CHIEF, ALLOCATIONS BRANCH  
MASS MEDIA BUREAU**

**REPLY COMMENTS OF  
MITCHELL BROADCASTING CO. OF IOWA**

Pursuant to Section 1.415(c) of the Commission's rules, 47 C.F.R. § 1.415(c) (1998), Mitchell Broadcasting Co. of Iowa hereby submits the following Reply Comments in the rulemaking proceeding to allot Channel 256A to Pleasant Dale, Nebraska. The Notice of Proposed Rulemaking in this proceeding was released on May 14, 1999, DA 99-897, and Mountain West Broadcasting filed supportive comments on July 6, 1999.

As detailed below, the Commission can not adopt the proposed amendment to the FM Table of Allotments without first requiring the submission of financial information from Mountain West. Over the past eight months, Mountain West has filed Petitions for Rulemaking for over 120 separate amendments to the FM Table of Allotments. In each Petition, Mountain West has certified that it will file an application for a construction permit for the new allotment. In addition, Mountain West has filed comments in each proceeding certifying that it would file an application for a construction permit and participate in an auction for each allotment. As

such, Mountain West has certified to the Commission that it will construct nearly 125 FM stations should the Commission grant its Petitions for Rulemaking, and the future construction permit applications.

Clearly, the Commission can not permit Mountain West to abuse the Commission's processes by its flood of "cookie-cutter" Petitions for Rulemaking. Instead, the Commission must require specific financial information from Mountain West that it is financially capable to prosecute each and everyone of its applications that it has certified it will prosecute, and construct each and everyone of the facilities that it has certified it will construct. Until such time that this information is provided, Mitchell respectfully requests that the Commission hold this proceeding in abeyance, or dismiss the Petition for Rulemaking.

## **II. DISCUSSION**

Mitchell is the licensee of Stations KOIL(AM), Bellevue, Nebraska, KQKQ(FM), Council Bluffs, Nebraska, KZFX(FM), Lincoln, Nebraska, and KKAR(AM), Omaha, Nebraska, and would compete directly with the proposed allotment.

Mountain West filed its Petition for Rulemaking in this proceeding on March 19, 1999.<sup>1</sup> Except for the description of the proposed facilities, and the population of the proposed community of license, the Petition is identical to every other petition it has filed in the past eight months. In each Petition, Mountain West provides only:

1. the population of the community,
2. a spacing study,

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<sup>1</sup> Comments are also being filed in the following proceedings: MM Docket No. 99-159 (Paxton, Nebraska); MM Docket No. 99-160 (Overton, Nebraska); MM Docket No. 99-161 (Hearshey, Nebraska); MM Docket No. 99-162 (Sutherland, Nebraska);

3. the general statement that the allotment would provide "an outlet for local self expression" and "a local communications outlet for warning the [community] area of emergency conditions caused by severe weather or other health hazards."

Mountain West has made no effort to demonstrate that any of its proposed allotments would serve the public interest, convenience and necessity, or that it would result in the "fair, efficient, and equitable" distribution of the broadcast service, as required by Section 307(b) of the Communications Act of 1934. Most important, though, is the fact that Mountain West has stated (almost always in Paragraph 8 of its Petitions) that it "will file an application for a Construction Permit to operate" the proposed facility. As such, Mountain West bases each of its Petitions on its intention to file, prosecute, and if selected, construct, the proposed facility.

The Commission has long required "an expression of interest in a proposed channel in order to conduct the rule making process in an orderly manner." *Santa Isabel, Puerto Rico and Christiansted, Virgin Islands*, 3 FCC Rcd 2336, ¶10 (1988). Such expression, the Commission has stated, is required to prevent "a newly allotted channel [to] lie vacant after the Commission had expended limited resources conducting a rule making proceeding." *Id.*

In fact, the Commission views these expressions of interest as "representations to the Commission." *Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911, ¶29 (1990). If such representations are "made by a party, who in fact, lacks the requisite intention to construct and operate the proposed facility", the Commission will consider the statements to be "material misrepresentations within the meaning of Section 73.1015 of the Rules and [the party] would be subject to prosecution pursuant to Section 502 of the Act, forfeiture pursuant to Section 503 of the Act or other appropriate administrative sanctions." *Id.* Indeed, the Commission has specifically warned parties of its willingness to investigate those instances where a pattern exists that a party has filed

petitions for allotments "where no genuine interest exists." *Morristown, New York*, 5 FCC Rcd 6976, ¶ 4 (1990).

As stated above, Mountain West has filed Petitions for Rulemaking, and the Commission has responded by releasing Notices of Proposed Rulemaking, to allot approximately 124 new FM channels in 1999. *See Exhibit One*. Additionally, Mountain West has filed comments in all but 15 of these proceedings stating its intent "that it will file an application for Construction Permit to operate a new station...during any window filing period or its intent to participate in auction process the Commission may conduct for this channel."<sup>2</sup> Mountain West has committed itself, therefore, to construct 124 new FM stations if awarded a construction permit through the auction process, or pursuant to a filing window.

However, if the past is indeed the prologue, Mountain West is woefully incapable of constructing all of the stations it has proposed to construct. As detailed in its Applications for Construction Permit for Commercial Broadcast Station (FCC Form 301) that it currently has pending, Mr. Michael, the principal of both Mountain West and "Michael Radio Group" apparently intends to construct and operate his stations for three months without revenue for less than \$50,000. Attached as *Exhibit Two* are the "Financial Qualifications" portions of Mr. Michael's applications in Newcastle, Wyoming (BPH-971107MI), Victor, Idaho ((BPH-970815MF), and (BPH-970814ML)), Franklin, Idaho (BPH-970814MM), and Hope, North Dakota (BPH-970925NC), whereby Mr. Michael estimates that he can construct and operate each station for less than \$50,000. Each of these applications are scheduled to be auctioned in the "Closed Broadcast Auction No. 25" on September 28, 1999. Previously, Mr. Michael

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<sup>2</sup> Mountain West's *Comments on Proposed Rule Making*, ¶ 2. Those proceedings in which it has not filed comments have filing deadlines after the deadline for Reply Comments in this proceeding.

certified that he will actively pursue each of these applications, and thus, he will be required to submit an upfront payment of \$80,000 by September 13, 1999. In addition, Mr. Michael will be required to file an FCC Form 175 by August 20, 1999, which contains a provision certifying that Michael Radio Group "is legally, technically, financially, and otherwise qualified pursuant to 308(b) of the Communications Act and the Commission's Rules." *Application to Participate in an FCC Auction*, Certification "1" (Aug. 1998 ed). Assuming that each of the 124 allotments are made by the Commission based on Mountain West's representations to participate in the auction and construct each facility, Mr. Michael will be required to make upfront payments of **\$1,984,000** to actively pursue each allotment!<sup>3</sup>

Previously, the Commission has stated that "in cases where an applicant has a large number of pending broadcast applications, the staff may question the validity of the applicant's financial certifications." *Certification of Financial Qualifications by Applicants for Broadcast Station Construction Permits*, 2 FCC Rcd 2122 (1987). The Commission has investigated those situations where an applicant improperly has provided financial certifications in more than one application. See *Welch Communications, Inc.*, 5 FCC Rcd 4850 (1990); *Texas Communications Limited Partnership*, 5 FCC Rcd 5876 (1990).

In fact, the Commission has stated that an applicant bears "the burden of showing that [it] was able to meet all his other outstanding financial commitments and the present broadcasting financial proposal." *Breeze Broadcasting Company, Ltd.*, 8 FCC Rcd 1835 (1993). In *Breeze*, an applicant had provided financial certifications relating to 72 LPTV applications, 46 MMDS application, and 30 cellular radio applications. *Id.* ¶6. The Review Board upheld the ALJ's

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<sup>3</sup> This assumes the minimum upfront payment, \$16,000. However, the average upfront payment in the "Closed Auction" is \$32,312.50, which would require upfront payments of **\$4,006,874** to actively pursue each application, as Mr. Michael has certified he will do.

decision to find that the applicant was not financially qualified to meet the financial obligations for the application at issue, since it was not possible to meet the financial obligations of all the applications on file at the time of making the financial certification. *Id.* ¶ 13.

The need to examine the financial wherewithal of Mountain West *prior to* the grant of the Petition for Rulemaking is especially important now with the introduction of broadcast auctions. Previously, should there have been a financial qualification issue, it would have been resolved through the comparative hearing process. However, now that the Commission only requires the filing of the Short Form FCC 175, an examination of an applicant's financial certification will not be held until *after* the auction. However, in an egregious situation as is present in the instant matter, an examination of Mountain West's financial health must be conducted before anymore of its Petitions for Rulemaking are granted.

It is clear, therefore, that the Commission must require sufficient financial information to demonstrate that Mountain West has sufficient financial reserves to meet all of its obligations *before* granting the instant Petition for Rulemaking. This is of special need in light of Mr. Michael's substantial underestimation of the costs to construct and operate a new FM station. However, even assuming that Mr. Michael somehow has 130 FM transmitters on reserve, and already owns the transmitter site for each of his allocations, he still must have financial reserves of \$5,850,000.<sup>4</sup>

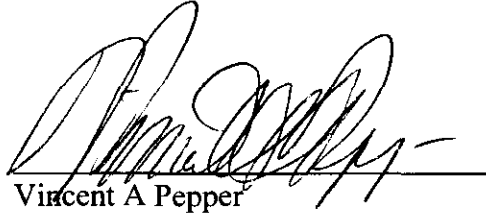
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<sup>4</sup> Assuming he receives all 130 FM construction permits, and constructs and operates the stations for three months without revenue for \$45,000. Realistically, the average cost for such operations is \$200,000. In that case, Mr. Michael would need to have financial reserves of **\$26,000,000!**

### III. CONCLUSION

Thus, Mitchell Broadcasting Co. Of Iowa respectfully requests that the Commission designate the instant proceeding to hearing *prior to* granting Mountain West's Petition for Rulemaking. It is incumbent upon the Commission to ensure that its processes are not abused, and its limited resources expended, by repetitive Petitions for Rulemaking that may very well never be constructed. Mountain West is required to be financially qualified to meet all of its obligations, and it should not be too onerous of a task to require proof of financial health before granting the Petition for Rulemaking.

**MITCHELL BROADCASTING CO. OF IOWA**

By:   
Vincent A Pepper  
Lee G. Petro

Its Attorneys

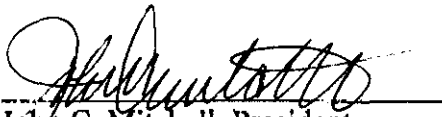
**PEPPER & CORAZZINI, L.L.P.**  
1776 K Street, N.W., Suite 200  
Washington, D.C. 20006  
(202) 296-0600

July 21, 1999



**DECLARATION OF JOHN C. MITCHELL**

I, John C. Mitchell, President, declare under penalty of perjury that I have reviewed the foregoing Reply Comments, and I hereby attest that the facts stated therein are true and correct to the best of my personal knowledge.

  
John C. Mitchell, President

July 19, 1999

## **EXHIBIT ONE**

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### **PETITION FOR RULEMAKINGS AND APPLICATIONS INITIATED AND FILED BY VICTOR A. MICHAEL**

<b>Docket #</b>	<b>RM #</b>	<b>City/State</b>
99-226	9603	Toquerville, UT
99-224	9605	Parowan, UT
99-223	9604	Leeds, UT
99-222	9602	Fountain Green, UT
99-220	9601	Darby, MT
99-212	9640	Amelia, LA
99-210	9629	Flagstaff, AZ
99-209	9628	Buras, LA
99-208	9627	Melba, ID
99-207	9626	Kuna, ID
99-206	9625	Kimberly, ID
99-205	9624	Hazelton, ID
99-204	9623	Grand View, ID
99-203	9621	Dove Creek, CO
99-202	9620	Mountainaire, AZ
99-195	9563	Wheatland, WY
99-194	9562	Rockford, IA
99-193	9561	Moville, IA
99-192	9633	Ravenna, NE
99-191	9632	Tularosa, NM
99-189	9592	Golden Meadow, LA
99-188	9591	Bruneau, ID
99-187	9590	Summit City, CA
99-186	9589	Mettler, CA
99-185	9588	Maricopa, CA
99-184	9587	Lost Hills, CA
99-183	9586	Herlong, CA
99-182	9585	Hamilton City, CA
99-181	9584	Easton, CA
99-180	9583	Cloverdale, CA
99-179	9582	Kurtistown, HI
99-178	9581	Kihei, HI
99-177	9580	Honokaa, HI
99-176	9579	Holualoa, HI
99-175	9578	Hanapepe, HI
99-174	9577	Hanamaulu, HI

99-173	9576	Wahiawa, HI
99-172	9575	Nanakuli, HI
99-171	9574	Carmel Valley, CA
99-166	9600	Elko, NV
99-165	9599	Lovelock, NV
99-164	9598	Mitchell, NE
99-163	9595	Jackpot, NV
99-162	9566	Sutherland, NE
99-161	9565	Hershey, NE
99-160	9617	Overton, NE
99-159	9616	Paxton, NE
99-158	9615	Dexter, NM
99-157	9614	Warrenton, OR
99-156	9613	Pleasant Dale, NE
99-155	-	Elgin, Oregon
99-152	9560	Captain Cook, HI
99-151	9559	Rangeley, CO
99-150	9558	Poncha Springs, CO
99-149	9557	Dinosaur, CO
99-148	9556	Del Norte, CO
99-147	9555	Congress, AZ
99-137	9571	Amazonia, MO
99-134	9543	Victor, MT
99-133	9523	Evergreen, MT
99-130	9517	Wellington, UT
99-129	9541	Monticello, UT
99-128	9520	Mona, UT
99-127	9521	Kanarraville, UT
99-126	9518	Hurricane, UT
99-125	9542	Huntington, UT
99-124	9519	Castle Dale, UT
99-122	9553	Minatare, NE
99-121	9552	Eagle Nest, NM
99-120	9551	Magdalena, NM
99-119	9550	Shiprock, NM
99-118	9549	Logandale, NV
99-112	9540	Thermal, CA
99-111	9539	Taft, CA
99-110	9513	Westcliff, CO
99-109	9512	Walsenburg, CO
99-108	9511	Sawpit, CO
99-107	9510	La Veta, CO
99-106	9509	La Jara, CO
99-105	9508	Center, CO

99-104	9507	Beulah, CO
99-103	9506	Bayfield, CO
99-097	9535	Manville, WY
99-096	9534	Newell, SD
99-095	9533	Dunkerton, IA
99-094	9532	Hinton, IA
99-093	9531	Pleasantville, IA
99-092	9530	Rudd, IA
99-091	9529	Manson, IA
99-090	9528	Socorro, NM
99-089	9516	Caliente, NV
99-088	9515	Wells, NV
99-086	9505	Fruitland, NM
99-085	9504	Overton, NV
99-082	9496	Allen, NE
99-079	9488	Broadview, MT
99-061	9448	Polson, MT
99-060	9449	Fort Benton, MT
99-059	9447	Fairfield, MT
99-057	9460	Upton, WY
99-056	9459	Big Piney, WY
99-055	9458	Thayne, WY
99-049	9473	El Jebel, CO
99-048	9472	Carbondale, CO
99-032	9445	Rye, CO
99-031	9444	Palisade, CO
99-030	9443	Aberdeen, ID
99-029	9439	Walden, CO
99-028	9438	Olathe, CO
99-027	9437	New Castle, CO
99-015	9440	Neihart, MT
99-014	9442	Columbia Falls, MT
99-012	9441	Joliet, MT
98-151	-	Douglas, WY
98-088	-	Wright, WY
98-087	-	Kaycee, WY
97-187	-	Patterson, IA
97-176	-	Roscoe, SD
97-119	-	Victor, MT
971107MI	-	Newcastle, WY
97-061	-	Superior, MT
97-058	-	Randolph, Utah
97-057	-	Hope, ND
97-051	-	Alberton, MT

97-044	-	Mills, WY
97-039	-	Driggs, ID
97-038	-	Weston, ID
97-037	-	Victor, ID
97-033	-	Victor, ID
97-024	-	Midwest, WY
97-013	-	Franklin, ID
96-243	-	Chugwater, WY
96-227	-	Glenrock, WY
96-218	-	Windsor, NY
96-151	-	Bear Creek, PA
	9641	Kootenai, ID
	9630	Winona, AZ
	9537	Alberton, MT
	PRM99MM	Caliente, CA
	PRM99MM	Cortez, CO
	PRM99MM	Cottonwood, TX
	PRM99MM	Fritch, TX
	PRM99MM	Kula, HI
	PRM99MM	Kuna, ID
	PRM99MM	Littlefield, AZ
	PRM99MM	Murphy, ID

## **EXHIBIT TWO**

### **Excerpts from FCC Form 301 – SECTION III - Financial Qualifications:**

- Newcastle, Wyoming – BPH-971107MI;
- Victor, Idaho – BPH-970815MF;
- Victor, Idaho – BPH-970814ML;
- Franklin, Idaho – BPH-970814MM; and
- Hope, North Dakota – BPH-970925NC.

# SECTION III - FINANCIAL QUALIFICATIONS

NOTE: If this application is for a change in an operating facility do not fill out this Section.

1. The applicant certifies that sufficient net liquid assets are on hand or that sufficient funds are available from committed sources to construct and operate the requested facilities for three months without revenue. ☒ Yes ☐ No
2. State the total funds you estimate are necessary to construct and operate the requested facility for three months without revenue. \$ 42,100.00
3. Identify each source of funds, including the name, address, and telephone number of the source (and a contact person if the source is an entity), the relationship (if any) of the source to the applicant, and the amount of funds to be supplied by each source.

Source of Funds (Name and Address)	Telephone Number	Relationship	Amount
VICTOR A. MICHAEL JR. 7901 STONERIDGE DRIVE CHEYENNE, WY 82009	307-632-7162	PARTNER	\$25,000
VAN A. MICHAEL 8910 BLUE MESA CHEYENNE, WY 82009-8402	307-638-3726	PARTNER	\$25,000
			Channel 222i Victor, Idaho BPH-970814MI

### SECTION III - FINANCIAL QUALIFICATIONS

NOTE: If this application is for a change in an operating facility do not fill out this Section.

1. The applicant certifies that sufficient net liquid assets are on hand or that sufficient funds are available from committed sources to construct and operate the requested facilities for three months without revenue. ☒ Yes ☐ No
2. State the total funds you estimate are necessary to construct and operate the requested facility for three months without revenue. \$ 42,250
3. Identify each source of funds, including the name, address, and telephone number of the source (and a contact person if the source is an entity), the relationship (if any) of the source to the applicant, and the amount of funds to be supplied by each source.

Source of Funds (Name and Address)	Telephone Number	Relationship	Amount
Victor A. Michael, Jr. 7901 Stoneridge Drive Cheyenne, WY 82009	307-632-7162	Partner	\$ 25,000.00
Van A. Michael 8910 Blue Mesa Cheyenne, WY 82009	307-638-3726	Partner	\$ 25,000.00
Channel 257A New Castle, Wyoming BPH-971107MI			



### SECTION III - FINANCIAL QUALIFICATIONS

NOTE: If this application is for a change in an operating facility do not fill out this Section.

1. The applicant certifies that sufficient net liquid assets are on hand or that sufficient funds are available from committed sources to construct and operate the requested facilities for three months without revenue.

☒ Yes ☐ No

2. State the total funds you estimate are necessary to construct and operate the requested facility for three months without revenue.

\$ 42,100.00

3. Identify each source of funds, including the name, address, and telephone number of the source (and a contact person if the source is an entity), the relationship (if any) of the source to the applicant, and the amount of funds to be supplied by each source.

Source of Funds (Name and Address)	Telephone Number	Relationship	Amount
Victor A. Michael, Jr. 790 Stoneridge Drive Cheyenne, WY 82009	(307) 632-7162	Partner	25,000
Van A. Michael 8910 Blue Mesa Cheyenne, WY 82009-8402	(307) 638-3726	Partner	25,000

Channel 282A  
Victor, Idaho  
BPH-970815MF

# SECTION III - FINANCIAL QUALIFICATIONS

NOTE If this application is for a change in an operating facility do not fill out this Section.

- 1 The applicant certifies that sufficient net liquid assets are on hand or that sufficient funds are available from committed sources to construct and operate the requested facilities for three months without revenue. ☒ Yes ☐ No
- 2 State the total funds you estimate are necessary to construct and operate the requested facility for three months without revenue. \$ 45,250.00
- 3 Identify each source of funds, including the name, address, and telephone number of the source (and a contact person if the source is an entity), the relationship (if any) of the source to the applicant, and the amount of funds to be supplied by each source.

Source of Funds (Name and Address)	Telephone Number	Relationship	Amount
VICTOR A. MICHAEL JR. 7901 STONERIDGE DRIVE CHEYENNE, WY 82009	307-632-7162	PARTNER	\$25,000.00
VAN A. MICHAEL 8910 BLUE MESA CHEYENNE, WY 82009	307-638-3726	PARTNER	\$25,000.00

Channel 284A  
Hope, North Dakota  
BPH-970925NC

### SECTION III - FINANCIAL QUALIFICATIONS

NOTE: If this application is for a change in an operating facility do not fill out this Section.

1. The applicant certifies that sufficient net liquid assets are on hand or that sufficient funds are available from committed sources to construct and operate the requested facilities for three months without revenue. ☒ Yes ☐ No
2. State the total funds you estimate are necessary to construct and operate the requested facility for three months without revenue. \$ 46,732
3. Identify each source of funds, including the name, address, and telephone number of the source (and a contact person if the source is an entity), the relationship (if any) of the source to the applicant, and the amount of funds to be supplied by each source.

Source of Funds (Name and Address)	Telephone Number	Relationship	Amount
VICTOR A. MICHAEL JR. 7901 STONERIDGE DRIVE CHEYENNE, WY 82009	307-632-7162	PARTNER	\$25,000
VAN A. MICHAEL 8910 BLUE MESA CHEYENNE, WY 82009	307-638-3728	PARTNER	\$25,000

Channel 249A  
Franklin, Idaho  
BPH-970814MM

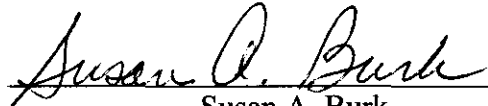
**CERTIFICATE OF SERVICE**

I, Susan A. Burk, a secretary with the law firm of Pepper & Corazzini, L.L.P., do hereby certify that a true and correct copy of the foregoing "REPLY COMMENTS" was hand-delivered to the following individuals on the 21<sup>st</sup> day of July, 1999:

Roy J. Stewart, Esquire  
Chief, Mass Media Bureau  
Federal Communications Commission  
Mass Media Bureau  
The Portals  
445 - 12th Street, S.W.  
Washington, DC 20554

Ms. Leslie K. Shapiro  
Federal Communications Commission  
Policy and Rules Division  
Mass Media Bureau  
The Portals  
4454 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

A. Wray Fitch, III  
Gammon & Grange  
8280 Greensboro Drive  
7<sup>th</sup> Floor  
McLean, Virginia 22102-3807

  
Susan A. Burk